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Before the filing of his suit, he had assigned one-third of the recovery to his attorneys. After the suit was filed and on August 14th, 1920, he assigned one-third of the balance of the recovery to Dr. J. B. Cranfill. On August 15th, 1920, he assigned two-thirds of the balance of the recovery to his mother-in-law, Mrs. A. E. Hutchinson. These assignments were in the form of letters and, among other things, stated: "I hereby transfer to you a two-thirds interest in all of these matters and agree to push to completion the patent referred to and to prosecute the two claims thru the courts in my name and, under this agreement, to turn over to you any results received therefrom as agreed."

On June 17th, 1921, Respondent filed a voluntary petition in bankruptcy. He did not list in his schedule of assets the suit or claim that he had sued on, which was then pending. He stated in his bankruptcy petition that he had duly surrendered all of his property. He stated in his schedule that he had not assigned any property for the benefit of creditors, and there were no assets. No trustee in bankruptcy was appointed.

The petitioners herein complain that the trial court should have granted their request for a peremptory instruction, that Respondent here, who was plaintiff in the lower court, was not entitled to recover on his suit and not entitled to prose-

cute the same because he had not scheduled the same in his bankruptcy proceedings, and petitioners alleged that he concealed this from the bankruptcy court and by said concealment, prevented said court from appointing a trustee, and that Respondent should not profit by his alleged concealment.

Respondent recovered in the trial court and also in the Court of Civil Appeals of Texas (286 S. W. 633), and a petition to the Supreme Court was denied and a rehearing was refused (289 S. W. 679).

Petitioners present this case upon one proposition; in substance that under the Bankruptcy Act a trustee takes all property of the bankrupt and that the claim of Respondent against Petitioners was property which was subject to the administration of the Bankruptcy Court, and when Respondent did not surrender the same for administration and no trustee was appointed for administration, Respondent was not entitled to prosecute the suit.

We make the following counter-propositions to the above position of petitioners, fully set forth in their specifications of error, page 16 of their brief, and state as the summary of Respondent's position:

(1) Under the Texas statute a cause of action may be assigned, and, after a valid assignment,

ceases to be the property of a person subject to administration in bankruptcy.

(2) As between the parties the assignment need not be in writing, acknowledged, filed and noted.

(3) The statute of Texas requiring assignments of causes of action to be in writing, acknowledged filed and noted, is a notice statute and is for the benefit of subsequent purchasers.

(4) A trustee in bankruptcy takes title to the property of a bankrupt as of the date of the filing of the petition in bankruptcy and takes such title as lien or judgment creditors of the bankrupt would have and is not in the status of a purchaser without notice.

(5) After the filing of a petition in bankruptcy, the bankrupt retains title to the property until the appointment of a trustee and during the time may prosecute and defend suits, and, if no trustee is appointed, may continue the prosecution of suits or claims for himself or for the benefit of the bankrupt estate.

(6) There is no necessity for a trustee where there is no estate of the bankrupt and it is not within the purview of the bankruptcy statute that a trustee should be appointed to prosecute a claim of which the bankrupt estate would derive no benefit.

(7) Before a trustee may avoid a transfer of property because of the provisions of the Bankruptcy Act, he must show that he represents and is entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer.

(8) Where a bankrupt in due course of the transaction of his business and long prior to bankruptcy treats property as sold or assigned, or assigns the same as collateral security, the bankrupt is bound and the trustee will be bound by the bankrupt's acts and be estopped from asserting that there was no sale or assignment.

We will present Respondent's position and at the same time attempt to answer Petitioners and will try to follow their brief in our reply.

ARGUMENT

The petitioners and respondent agree upon the facts in this case. Respondent does not agree with the conclusions and inferences that petitioners have drawn from the facts and does not agree with the application of the authorities that have been cited by petitioners.

Article 6636 of the Texas Statutes of 1925, which is fully quoted by petitioners on page 20 of their brief, sets forth the manner of the sale of a judgment of a court of record or of a cause

of action or any interest after suit is filed. The closing part of the statute reads:

> "When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

This statute shows that its purpose was to give notice to persons subsequently dealing with each other with reference to the cause of action or judgment and does not affect, or purport to affect, the rights of the parties to the judgment or the parties to the cause of action as between themselves. The courts of Texas, in construing this statute, have held that it did not apply to the parties to the judgment or to the cause of action. In STANDIFER VS. BOND HDW. CO., 94 S. W. 144, the court said:

> "The assignment could have been proved by oral testimony as well as by the written transfer, but the only evidence of the assignment of the action to appellee was by the written transfer, and without proof of its execution it was not admissible. The Article in question does not purport to be making a rule as to the admission of such transfers in evidence, but is merely making a rule as to notice to third

parties of the assignment of the cause of action."

In TRINITY CO. LBR. CO. VS. HOPE, 144 S. W. 1029, in which writ of error was denied by the Supreme Court, in discussing the purpose of this statute, the court said:

"The purpose of the statute was to furnish parties dealing with the cause of action notice."

We have other statutes to which similar constructions have been given. We have a statute with reference to the limitation of causes of action on purchase money, vendor's lien and mortgage lien notes, which under Article 5695 provided that the note and lien would cease to exist four years after the maturity of the note unless the same was renewed within the four years by an instrument in writing, acknowledged as in deeds of conveyance and recorded in the county where the land was located, and that the right to enforce the lien after the time was barred and the lien would cease to exist. The question was raised that it was necessary for a valid extension to comply with the statutory provisions, but the court said:

"There is nothing in the caption of the original Act nor in its language as now embraced in the cited article of the statute which

would require the construction that it was the intention of the legislature in the enactment of the law to declare void as between the parties any renewal of the lien on the land which is not recorded in accordance with the provisions of the Act. No public benefit could be subserved by such a law. If the parties can create a valid lien on land without putting it of record, no possible reason suggests itself to our mind for denying them the right to extend or renew the lien in the same way. We think the obvious purpose and intent of the statute was to protect subsequent purchasers of the land from unrecorded renewals or extensions of liens and not to unnecessarily hinder parties in their right to make contracts." AMONETTE VS. TAYLOR, 244 S. W. 238, in which writ of error was refused.

Again, in Watson, et al, vs. First National Bank of Coleman, the Commission of Appeals, which is an auxiliary of the Supreme Court of Texas, in 285 S. W. 1050, in passing upon the statute, said:

"We come, then, to the one controlling question in this case and that is, whether or not the legislature intended to render the lien barred as between the parties to the same just because the extension thereof was not acknowledged and recorded. These Articles, passed in 1913, are in a large sense statutes

of limitation but they are more than that. In one sense they establish rules of evidence. In another, they are registration statutes. In so far as they require the recording of a renewal, after proper authentication, they are unquestionably registration statutes. That being true, in order to determine the intention of the legislature upon the point here in controversy, it is necessary to consider other registration statutes. Now Article 6824 is a direct expression of the legislative policy of this state upon the effect of acknowledging and recording instruments affecting real estate. That article includes any and every kind of instrument affecting real property. It provides that the recording is necessary when third parties are to be considered. But it expressly provides the contrary rule to be true when the instruments are being construed as between the parties themselves".

Under the history of the legislation and of our registration statutes, it seems clear that Article 6636, with reference to the sale of a judgment or cause of action or any interest was a notice statute and intended to apply to third parties and the same is borne out by the case of PUTNAM VS. CAPPS, 25 S. W. 1024, in which the court said, quoting Freeman on Contracts:

"If a statutory mode of assigning judgments

is provided, this does not operate as an inhibition against all other modes of assignment. It is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way; and such assignment, as to all persons having notice thereof, is as effective as the statutory assignment. This seems to us the proper construction of our statute. No express condemnation of other transfers is contained therein; its leading purpose apparently being to make assignable causes of action which previous thereto could not be transferred, and to charge with notice of certain transfers, when executed and filed in the manner provided. We therefore, conclude that as between the parties, and those not in a position to claim as purchasers without notice, a verbal transfer of a judgment is good in equity, even since the passing of this statue."

In SMITH VS. RY. CO., 39 S. W. 969, referring to this statute, the court said:

"In other words, it affords the assignee an opportunity to visit notice upon the world that he has become the purchaser of the judgment or cause of action and no equities can be set up against him. This statute, in our opinion, does not have the effect of invalidating an equitable assignment of the judgment."

We think that under these authorities petition-

ers are wrong in their statement to this court that the assignments of respondent were void.

Petitioners are in error in their application of Sections 47-a and 70-a of the Bankruptcy Act. Section 47-a provides in substance:

> "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly recorded and unsatisfied".

Section 70-a provides in part:

> "The trustee of the estate of a bankrupt upon his appointment and qualification and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, etc".

In discussing the effect of the Amendment of 1910 to Section 47-a, Collier in the 13th Edition, Vol. 2, page 1054, says:

"The class of cases, unprovided for by the original Act, and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens".

And at pages 1055 and 1056, says:

"The amendment vests in the trustee by operation of law, a lien equivalent in all respects to that acquired upon the property coming into the custody of the trustee by virtue of legal or equitable proceedings instituted against the bankrupt by a creditor, but does not necessarily give him the status of a purchaser without notice".

And Collier says at page 1058 of Vol. 2:

"The state law controls as to what rights a lien or execution creditor would have," and

at page 1260 says:

"The state law relative to registering or recording will determine as to whether or not a transfer is required to be registered or recorded. A transfer is 'required' to be recorded within the intention of this Section in those cases in which under the state law recording is necessary in order to make the transfer valid as against those concerned in the distri-

bution of the insolvent estate; that is, as against creditors, including those whose position the trustee is entitled to take by virtue of Section 47-A as amended in 1910".

And again at page 1262:

"A transfer is not 'required' to be recorded or registered where, by a state law, an unrecorded transfer is only void as against subsequent purchasers in good faith".

Again at page 1522:

"The amendment did not give the trustee the status of an innocent purchaser, and, therefore, where the state law makes unrecorded conditional sale contracts void only as to subsequent purchasers for value, pledges, or mortgages in good faith, it does not make them void as to a trustee in bankruptcy".

As we understand this case, the Texas statute does not prohibit the transfer of a cause of action as between the parties and the same is valid as between the parties, without being in writing, acknowledged or recorded. That the acknowledgment, filing and noting of an assignment is for the benefit of "all persons subsequently dealing with reference to said cause of action" etc. This statute has reference to subsequent assignees or purchasers of the judgment or cause of action, because it uses the words, "all persons subse-

quently dealing with reference to said cause of action", and, necessarily means person who voluntraily act or deal or transact business pertaining or with reference to the cause of action, which would be subsequent assignees, transferees or purchasers.

The trustee would not be entitled to take possession of this cause of action or to assume to administer upon the same in the bankruptcy court, because, under the statute, the trustee's position is that of a creditor holding a lien by legal or equitable proceedings, such as is vested by operation of law. Respondent's transfer or assignment of his cause of action was good as to all except persons subsequently dealing with reference to it, without being acknowledged and noted. Then Smith's transfer and assignment was good as to his creditors, because his creditors are not protected within the purview of the state statute and the trustee is entitled to the property that the creditor would be entitled to and takes possession of property as a creditor holding a lien by legal or equitable proceedings. This excludes the right of the creditor to claim that Smith's transfer or assignment was void as to him and excludes the position that the trustee in bankruptcy could claim that Smith's transfer and assignment was void as to him, the trustee. We find this position supported by the text which we have quoted above. We are supported by the Supreme Court in the

case of CAREY VS. DONOHUE, 240 U. S. 430, 60 L. Ed. 726, in which the bankrupt in the State of Ohio gave a deed to property more than four months before he filed his petition in bankruptcy but the same was not recorded until within the four months, and the trustee sought to show that the same was a preference, because, as the trustee claimed, a deed to be valid must be recorded and that the same took effect from the date it was recorded, which was within four months from the filing of the petition in bankruptcy. The statute of Ohio provides

> "All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements or hereditaments, executed agreeably to the provisions of this chapter shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having at the time of purchase, no knowledge of the existence of such former deed or instrument".

The Supreme Court in deciding the case, said

> "But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was 'required' to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contem-

plation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the Bankruptcy Act. * * * In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the applicable law was solely in favor of subsequent bona fide purchasers without notice. These subsequent purchasers are entirely outside of the purview of the Bankruptcy Act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause, 'if by law recording or registering thereof is required', had any reference to requirements in the interests of persons of this description. The limitation of the provision to those transfers which are 'required' to be recorded under the applicable law is not to be taken an artificial one by which the rights of creditors are made to depend upon the presence or absence of local

restrictions adopted, alio intuitu, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interest in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirements, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under Section 60."

Section 60 of the Bankruptcy Act provides how a preference is given and reads:

"Where the preference consists in a transfer such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted. (b) If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and

before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such persons."

Under the authorities above cited, the transfer or assignment of a cause of action is not such a one as is "required" to be recorded or registered, and the same would not be voidable by the trustee and the trustee could not recover the property or its value when the assignment was more than four months prior to the filing of the petition and was not such a one as was required to be registered or recorded.

Section 70-e provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication".

Under the authority of CAREY VS. DONO-

HUE, 240 U. S. 430, 60 L. Ed. 726, the trustee could not avoid the transfer in this case.

Again, Collier, Vol. 2, page 1643:

> "It is well settled that the trustee takes the property of the bankrupt not as an innocent purchaser, but subject to all valid claims, liens and equities; * * * Whatever rights a third party had against the property of the bankrupt before the adjudication, that part, in the absence of fraud, or fixed liens created by state statute in favor of others, has against his estate in bankruptcy. The validity of all claims, liens and equities, is to be determined in the absence of federal statute, by the local law as evidenced by the decisions of the state courts."

Page 1647 in discussing the Amendment of 1910, said:

> "But it may not be invoked to deprive a creditor of the bankrupt of equity existing in his favor at the time of the bankruptcy, and was not intended to limit the general rule that a trustee takes the bankrupt estate subject to all valid claims, liens and equities". Citing authorities.

There is another well known proposition that would prevent the trustee in bankruptcy or the bankruptcy proceeding from avoiding this trans-

fer; that is set forth by Collier at page 1648:

> "Where a bankrupt in due course of the transaction of its business, some time prior to bankruptcy, treats property as sold, and the proceeds thereof as due, and assigns the same as collateral security to a loan, the trustee will be bound by the bankrupt's acts and is estopped from asserting that there was no sale."

And quotes from the opinion ALDINE TRUST CO. VS. SMITH, (C. C. A. 3rd Cir.) 182 Fed. 449, citing FOURTH STREET BANK VS. YARDLEY, 165 U. S. 634, 41 L. Ed. 855, as follows:

> "A bankrupt corporation had, some time prior to bankruptcy, agreed as sub-contractors to furnish and set tile for several buildings then in course of construction and had delivered tile to each of the buildings, after which it borrowed money from a trust company, giving its notes therefor and as collateral security for their payment executed assignments of the money due for material furnished. The assignments stated and it was orally represented to the trust company at the time of the loans that the money was then due. Before the work of setting the tile had been begun, the corporation went into bankruptcy and the trustee claimed title to the tile. HELD, that the bankrupt having treated the tile as sold to the contractors, and proceeds thereof as due, and

having assigned the same as collateral security to the loan, neither it nor its trustee will be heard to assert the contrary as against the trust company".

Petitioners cannot complain in this instance because it was not shown in the trial court and neither is it show here that the estate of the bankrupt suffered or that any injury was done it or any creditor. Collier at page 1263, says:

"But before a trustee may avoid a transfer because of the provision in question (referring to Section 60), he must in fact represent or be entitled to take the place of some creditor whose claim actually stood in a superior position to the challeneged transfer while unrecorded and within the specified period. Thus, where the state law makes an unrecorded mortgage only void as against creditors who have, prior to the filing or recording thereof, acquired a lien by attachment or execution, and there does not appear to be any creditor who has acquired such a lien prior to the filing of such a mortgage, within the four months period, such filing does not effect a preference". Citing the case of CAREY VS. DONOHUE above quoted from.

For the above reasons, the assignment was valid and petitioners have no right to complain.

Petitioners complain here and assert that Respondent committed crimes and concealed his assets and true status from the bankrupt court and prevented the appointment of a trustee and that he cannot now prosecute the suit.

Section 70 of the Bankruptcy Act provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

Collier, at page 1638, says:

> "It follows that, under the present law, the legal title to property remains in the bankrupt to the date of the appointment of the trustee."

At page 1721:

> "Where no trustee was ever appointed, a bankrupt, in an action for services rendered, is not precluded from recovery by the fact of his adjudication after the cause of action had accrued".

3 Ruling Case Law, Section 64, page 233:

> "While for many purposes the filing of a petition in bankruptcy operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title

is not thereby divested; he is still the owner, tho holding in trust until the appointment and qualification of the trustee, who thereby becomes (in the language of Section 70-a) 'vested by operation of law with the title of the bankrupt', as of the date of the adjudication. During the interval between the filing of the petition and the election of the trustee the title remains in the bankrupt, the date of adjudication simply marking the point of time to which the title, if subsequently acquired by the trustee, relates back. The bankrupt's title before it is superseded by that of the trustee is sufficient to authorize his institution and maintenance of a suit on any cause of action possessed by him". Citing RAND VS. OHIO CENT. R. CO., 186 N. Y. 68, 78 N. E. 574, 116 A. S. R. 530, 9 Ann. Cas. 542.

In this case just cited, it was insisted that no trustee was appointed and that the failure so to do was due to the plaintiff in not disclosing the existence of any claim or property in the bankrupt proceeding, and the Court of Appeals, in holding that Rand could maintain his suit, among other things said:

"While the concealment of any property on the part of a bankrupt must be deemed a reprehensible act as toward his creditors, it by no means follows that such concealment has

any bearing upon the question as to whether the bankruptcy proceedings have gone far enough to divest the bankrupt of title. In our judgment the proceedings in the case of the plaintiff had not progressed sufficiently to deprive him of the right to maintain an action in his own name in the state court upon the claim in suit. The Bankruptcy Act of 1898, Section 70, provides that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt. It is plain that this provision can never become effective until a trustee in bankruptcy shall have been appointed. Here none was appointed; hence, the conditions did not exist which were requisite to render this provision of Section 70 operative. * * * As was said by the Supreme Judicial Court of Massachusetts in another litigation growing out of the same fire: 'No change of title was effected until the appointment, and qualification of the trustee'. Fuller vs. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879. So here the plaintiff's title to the chose in action, which is the basis of the present suit, did not pass out of him in the bankruptcy proceedings, since no trustee was appointed to whom it could pass".

In the case of CHRISTOPHERSON VS. HAR-

RINGTON, 18 Minn. 42, 136 N. W. 289, 41 L. R. A. (ns) 276, the Supreme Court of Minnesota said:

> "The bankrupt is no longer regarded as civilly dead during the period elapsing between the adjudication in bankruptcy and the appointment of the trustee. Loveland Bank., 759, Plaut vs. Gorham Mfg. Co., (D. C.) 174 F. 852. On the contrary, the courts now hold that the title to the property remains in the bankrupt and subject to his control until the trustee is appointed and qualified. He may, during that period, maintain such actions or proceedings as may be necessary to preserve and protect the property, and his rights in this respect are only divested by the appointment of the trustee".

In GORDON VS. M. & T. INC. CO., 120 La. 441, 45 So. 384, 15 L. R. A. (ns) 827, 124 A. S. R. 434, 14 Ann. Cas. 886, the court said:

> "In the interval between the adjudication in bankruptcy and the appointment of the trustee the title of the property tendered remains in the bankrupt. The decree itself does not pass the title. Its date simply marks the point of time to which the title, if subsequently acquired by the trustee, relates back. The title of the bankrupt in the intervals exists. It may vest in the trustee, or it may not, as circumstances should develop. * * * But if no trustee

is ever appointed, the bankrupt does not part with the ownership of his property. There might be and are cases where it might never be necessary to appoint a trustee. If not, there never was a change in the title, and if there was no change in the title, the policy was not void. Under the Bankruptcy Law, there is no change of title until the trustee is actually appointed and qualified, whatever may be its retroactive effect when it is actually accomplished".

This case involved the question of the effect of bankruptcy upon a fire insurance policy which provided for the policy being void if the interest of the insured be otherwise than as unconditional and sole ownership.

In JOHNSON VS. COLLIER, 222 U. S. 538, 56 L. Ed. 306, Johnson recovered judgment against Collier and execution was issued and levied on Collier's property. Under the provision of the state law, Collier filed with the sheriff a claim for exemption. On the same day he filed in the United States Court a voluntary petition in bankruptcy, including the property levied on in his schedule of assets. The sheriff sold the property. Collier was adjudged a bankrupt later, and before a trustee was elected, Collier brought suit against the sheriff and the plaintiff in the judgment for damages, on the theory that they were trespassers

after he, Collier, had notified them of his claim of exemption. Johnson and the sheriff set up the plea of the pendency of the bankruptcy proceedings and alleged that Collier had no title in the cause of action. They claimed it was in gremio legis until the election of a trustee. Demurrer to this plea was sustained and Collier recovered a judgment. This was affirmed by the Supreme Court of Alabama and the Supreme Court of the United States granted a writ of error. Justice Lamar wrote the opinion and held that Collier, the bankrupt, was not divested of his property by the filing of the petition in bankruptcy; that he was still the owner, holding in trust, pending the appointment and qualification of a trustee, whose title then relates back to the date of the adjudication. Justice Lamar said in part:

> "Yet his title is not thereby divested (referring to the filing of the petition in bankruptcy). He is still the owner, tho holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt', as of the date of adjudication."

The opinion further holds that until the trustee is appointed, the bankrupt has a title sufficient to authorize him to institute and maintain suit on any cause of action possessed by him, saying:

> "Until such election the bankurpt has title—

defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of the opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. Thatcher vs. Rockwell, 105 U. S. 467, 25 L. Ed. 949.

If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of

creating a fund which may be set apart to him as an exemption. If the trustee will not sue, and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice. Rand vs. Iowa Cent. R. Co., above cited. Southern Express Co. vs. Connor, 49 Ga. 415.

There was no error in holding that the bankrupt had title to the cause of action and could institute and maintain suit thereon".

The position might be different if a trustee had been appointed and there was no showing that he had declined to prosecute the suit. In this case, it is not shown that the court or creditors were not fully advised of the situation and that they concluded they did not have such an interest in the suit as to justify the appointment of a trustee and enforce a prosecution of the claim. There is no showing that the estate of the bankrupt or the creditors of the bankrupt other than the assignees could be benefited by this suit, and

there is no showing that there was a fraud perpetrated on the federal court. A trustee is appointed in the interest of the creditors and for the benefit of the estate, and if there is no occasion for a trustee, there is no reason why one should be appointed.

Petitioners make much of Respondent's failure to schedule this claim and state that he committed a crime and swore falsely and say he now seeks to profit by it. There is no showing from fact or circumstances that Respondent made a false oath or will profit by this suit. Neither is there any showing that petitioners have been injured in any particular or that they have been prejudiced in the trial of their case, and upon the merits, petitioners do not complain that the liability imposed upon them by the judgment was an unjust one or that they have been prejudiced in the trial of the case, or that the parties who will receive the benefit of the judgment are not entitled to the same.

Petitioners speak thru strained constructions and imaginary techincalities to say that Respondent and his assignees should not profit, when there is no profit to them other than what the merits of the case have determined they were justly entitled to. But petitioners have nothing to say and offer no excuse to justify their position that they seek to profit by having what has been de-

creed a just claim against them set aside by strained constructions and imaginary technicalities.

Respondent's position in making his petition and filing schedules in bankruptcy was that he had no interest in this suit. He testified and produced written documents as to when, where and how he transferred his interest. There is nothing to show that the bankruptcy court and the creditors were not in fact advised as to the situation. If they were not and petitioners' position is correct, this cause of action or the recovery from it would be the property of the creditors of the Respondent and, by reason of his fraud in filing his petition and schedules, if petitioners are correct, he could not plead his discharge to defeat them, but petitioners cannot complain at the bankruptcy proceedings or at the failure of the bankruptcy court to administer upon the estate because they were not parties to the bankruptcy proceeding. A discharge in bankruptcy is a judgment of the court and there is provision for reopening or setting it aside, but it is not subject to collateral attack and not subject to be set aside or reopened by any one except an interested party, and petitioners are not such.

Respondent does not claim any interest in this cause of action, neither now nor at the time the suit was tried. He testified and produced writ-

ten evidence that he was under contract to prosecute the suit to judgment and in his own name, and that accounts for his prosecution of the suit. The fact that his estate had no interest in the suit and could acquire no interest in the suit because of the previous assignments, accounts for his statements in his schedule and accounts for the failure of a trustee to be appointed, and certainly, Respondent cannot be condemned for undertaking to pay his debts and abide by his contract to prosecute this suit for the benefit of the assignees.

Respectfully submitted.

J. E. Adams

W. B. Harrell

Dallas, Texas.
Attorneys for Respondent.